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No. 81-152

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK WEIT, JAMES B. COX and ROBERT W. MCLALLEN, ETC., PETITIONERS

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioners had failed to adduce sufficient facts supporting their claim of a price-fixing conspiracy to resist respondents' summary judgment motions.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are holders of credit cards issued by respondent Continental Illinois National Bank and Trust Company of Chicago as part of the Midwest Bank Card System, Inc. ("Midwest"), a bank credit

card system established in 1966. Respondents are major banks in the Chicago market that are members of Midwest and were involved in its initial planning and development.[1] In 1970 petitioners filed a complaint in the United States District Court for the Northern District of Illinois alleging, *inter alia*, that respondents had engaged in a horizontal price-fixing conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The conspiracy allegedly consisted of an agreement among the respondent banks to charge the identical interest rate of one and one-half per cent per month, or 18% per year, to their bank card customers.[2]

After eight years of extensive discovery,[3] respondents moved for summary judgment.[4] In support of their motions, respondents supplied affidavits denying petitioners' allegations and claiming that each bank had independently arrived at the 18% interest rate based upon its own analysis of the applicable usury laws and its own estimate of the costs likely to be

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[1] Although a representative of respondent American National Bank & Trust Co. attended the initial meetings in 1966 leading to the formation of Midwest, it did not join Midwest until 1969 (Pet. App. A-6 to A-7 & n.5).

[2] A cardholder pays interest only when he fails to pay the balance due within the time allowed by his bank (Pet. App. B-44). The method used to compute the actual amount of interest owed on an unpaid balance varies from bank to bank (Pet. App. A-9 n.11).

[3] Petitioners' discovery consisted of "at least 71 depositions, 297 interrogatories, 128 requests for admission, and innumerable document production requests" (Pet. App. B-26).

[4] Prior motions for summary judgment had been denied in 1974 (Pet. App. D) and in 1976 (Pet. App. E).

incurred in establishing the credit card system (Pet. App. A-10). Respondents denied discussing the interest rates to be charged customers, and they presented evidence that their activities had been monitored carefully by counsel to prevent any possible antitrust violations (*id.* at A-10 to A-11).

Petitioners' evidence of alleged conspiracy was entirely circumstantial. That evidence showed that all of the respondent banks charged 18% interest on their credit cards from 1966 to 1978 (Pet. App. A-9 & n.11); that during the meetings resulting in the formation of Midwest a representative of a respondent bank mentioned the rate allowed under state usury laws and another mentioned the rate charged by Bank Americard (*id.* at A-18 to A-19); that officers of the respondent banks had many opportunities to discuss interest rates (*id.* at A-9, A-32); and that the agreement establishing Midwest mandated uniformity among its members in most aspects of their credit card operations (*id.* at A-38). Petitioners also relied upon respondents' successful joint lobbying efforts before the Illinois state legislature in support of legislation that, as finally enacted, established an annual interest rate ceiling of 18% (*id.* at A-10, A-22, A-39). Finally, petitioners submitted an affidavit by their economic expert, Bernard Shull, who expressed the opinion that "conscious cooperation" was the likely cause of the uniform rate charged by respondents (*id.* at A-9).

2. The district court granted respondents' motions for summary judgment (Pet. Apps. B & C), finding that the facts adduced by petitioners in support of their price-fixing claim were insufficient to support a jury verdict in their favor or to resist respondents' summary judgment motions (*id.* at B-26 to B-40). The court observed that after eight years of extensive

discovery plaintiffs had exhausted virtually every possible source of evidence, and the court stated that petitioners' " 'vague hope that something may turn up at trial' " was not enough to justify further protracted proceedings (*id.* at B-26 to B-27, quoting *Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)). In reaching its conclusion, the court refused to consider respondents' joint lobbying activities (Pet. App. B-25 n.22). The court noted (*ibid.*) this Court's holdings that such activities are permitted under the Sherman Act (*United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)) and also the Court's statement in *Pennington* that a trial judge has the discretion to admit evidence of such activities to show the purpose or character of other allegedly illegal transactions provided that the judge concludes that the evidence is "probative and not unduly prejudicial" (381 U.S. at 670 n.3). The district court stated that it would exclude such evidence if the present case went to trial "in light of its minimal probative value as well as inevitable prejudicial effect on a jury" and it therefore excluded that evidence from consideration in ruling upon respondents' summary judgment motions (Pet. App. B-25 n.22).

3. The court of appeals affirmed with one judge dissenting (Pet. App. A). Both the majority and the dissenting opinions recognized that summary judgment may be granted only if the facts adduced by the parties would be insufficient to support a verdict in favor of the party opposing the motion (*id.* at A-11 to A-12, A-30). The two opinions differed, however, in their assessment of the strength of petitioners' evi-

dence (*id.* at A-13 to A-22, A-31 to A-53). The two opinions also disagreed about the district court's ruling concerning evidence of respondents' joint lobbying activities. While the majority held that the district court had correctly excluded that evidence from consideration (*id.* at A-22 to A-24), the dissent suggested that evidence of slight probative value may be excluded under Fed. R. Evid. 403 only if it "tends to horrify, evoke sympathy or increase a desire to punish due to prior bad acts" (Pet. App. A-44).

ARGUMENT

The decision of the court of appeals rests largely upon the peculiar facts of this case and does not conflict with any decision of this Court or any other court of appeals. It presents no legal issue of general importance that warrants this Court's review.

1. Petitioner's primary argument (Pet. 6-14) is that the standard applied by the court of appeals in granting summary judgment was "[n]ovel and [i]llegitimate" (*id.* at 6) and conflicts with decisions of this Court and the lower federal courts (*id.* at 8-14). Petitioners' contention lacks merit.

The "[n]ovel and [i]llegitimate [s]tandard" to which petitioners refer (Pet. 6) is apparently the following (Pet. App. A-13; citations omitted):

> Parallel business behavior or "conscious parallelism" is the type of circumstantial evidence which, absent more direct evidence, will be relied on in inferring unlawful agreement. However, when defendants come forward with denials sufficient to shift the burden under Rule 56(e), plaintiffs must come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement.

Contrary to petitioners' assertion, the standard employed by the court of appeals was neither novel nor erroneous. Rule 56(c), Fed. R. Civ. P., provides that summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A defendant is entitled to judgment as a matter of law where the plaintiff's claim for relief is based on an erroneous legal theory or where, viewing the evidence in the light most favorable to plaintiff, the evidence on which plaintiff relies is not sufficient to support a jury verdict in his favor. See 10 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §§ 2725-2728 (1973); II P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and their Application* § 316 (1978). When a motion for summary judgment is not based exclusively upon the pleadings, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits [, depositions, answers to interrogatories, or admissions] must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed. R. Civ. P. If the "specific facts" contained in the parties' submissions would be insufficient to support a verdict in favor of the party opposing the motion, even when viewed in the most favorable light (see *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)), then the motion must be granted. See *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-290 (1968); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944); *United States* v. *General Motors Corp.*, 518 F.2d 420, 441-442 (D.C. Cir. 1975); 10 C. Wright & A. Miller, *supra*, § 2725, at 512.

The court of appeals merely applied these familiar principles to petitioners' action alleging a horizontal conspiracy to fix prices. It is well established that evidence of parallel pricing does not conclusively prove the existence of a price-fixing conspiracy. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). Parallel pricing may result from independent business decisions by the alleged conspirators. Indeed, as the court of appeals recognized (Pet. App. A-15), a competitive market in a fungible product such as money would be characterized by price uniformity. Thus, the court of appeals correctly held (Pet. App. A-13) that where the "specific facts" contained in the parties' submissions conclusively negate the inference of a conspiracy arising from the evidence of price uniformity, summary judgment must be granted in the defendants' favor unless there are sufficient additional facts to support the claim of conspiracy. It is this unobjectionable principle that petitioners attack.

Applying that principle to the particular facts of the present case, the court of appeals decided, after a thorough and independent review of the record, that respondents were entitled to summary judgment. Like the district court, the court of appeals concluded that the facts brought out by eight years of exhaustive discovery were too insubstantial either to support a jury verdict or to justify a trial. There is no need for this Court to review those factual determinations, which are of importance only in this particular case. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Petitioners' claim that the decision of the court of appeals conflicts with *Interstate Circuit, Inc.* v. *United*

States, 306 U.S. 208 (1939), is also without merit. In that case—a price-fixing suit brought by the government against motion picture distributors and exhibitors—the exhibitors, who operated the vast majority of movie theaters in cities in their region, had sent the same letter to each distributor demanding that the distributor adhere to certain terms in licensing its pictures to all theaters in that area. After conferring with the exhibitors, each distributor agreed to most of the terms. After a trial, the district court entered judgment in favor of the government and inferred the existence of a conspiracy among the distributors

> from the nature of the proposals made on behalf of [the exhibitors]; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors; and from the fact that appellants did not call as witnesses any of the superior officials who negotiated the contracts with [the exhibitors] or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors.

Id. at 221. This Court affirmed, finding the evidence sufficient to support the finding of a conspiracy among the distributors.

Petitioners are less than clear in specifying precisely how *Interstate Circuit* conflicts with the present case. Petitioners state (Pet. 8):

> In *Interstate Circuit*, the collective pricing action of the defendants was held to be sufficient circumstantial evidence of conspiracy * * *.

But in the present case, the court of appeals recognized that an unlawful agreement may be inferred

from price uniformity (see Pet. App. A-13). The court of appeals held, however, that such an inference may be negated by strong, contrary evidence and is not always sufficient by itself in such circumstances to support a jury verdict. There is nothing to the contrary in *Interstate Circuit*.

Petitioners state (Pet. 8):

> Although the Court mentioned [in *Interstate Circuit*] that it was open to the defendants in such a case to present evidence that their actions actually arose from independent motives, there is no hint that such evidence would be anything but contrary evidence to be weighed by a jury.

But *Interstate Circuit* reached this Court after the trial was completed, and the evidence of price uniformity was by no means the only proof supporting the trial court's finding. Thus, petitioners would infer a conflict from this Court's failure to address an issue not germane either to the procedural posture of the case before it or to the evidence in that case.

In like manner, nothing in the court of appeals' decision conflicts with *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), or *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962), as petitioners claim (Pet. 23, 26). These decisions do not preclude district courts from entering summary judgment against antitrust plaintiffs who fail to offer "any significant probative evidence tending to support the complaint." *First National Bank of Arizona* v. *Cities Service Co.*, *supra*, 391 U.S. at 290.

There is also no conflict between the present case and *Ambook Enterprises* v. *Times Inc.*, 612 F.2d 604 (2d Cir. 1979), cert. dismissed, 448 U.S. 914 (1980). Although the court of appeals there reversed the entry of summary judgment in favor of defendants

alleged to have conspired to fix prices, the evidence proffered by the plaintiff was significantly different from that in the case at bar. For one thing, there was "abundant" evidence that a price-fixing conspiracy had existed before the period alleged in the complaint (612 F.2d at 611). Indeed, far from supporting petitioners' argument, *Ambook Enterprises* actually rejects petitioners' central contention that evidence of price uniformity is always sufficient to defeat a defense motion for summary judgment in a price-fixing case. In *Ambook Enterprises*, the court recognized that summary judgment may be properly entered in favor of the defendants where the inference arising from evidence of parallel conduct is "explained away" or "overwhelm[ed] by their proof (see *id.* at 615 & n.17). Moreover, as support for that proposition the *Ambook Enterprises* court (see *id.* at 615) relied upon *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), a case involving a parallel refusal to deal. Thus, *Ambook Enterprises* is also inconsistent with petitioners' contention (see Pet. 6-10) that the court of appeals "misapplied" the *Cities Service* decision by relying upon it in a price-fixing context. We fully recognize that the inference arising from evidence of parallel business conduct may be stronger in some types of cases than in others (and certainly the strength of the inference varies in individual cases depending upon the nature of the proof), but there is simply no authoritative support for petitioners' claim that proof of parallel pricing is always sufficient to defeat summary judgment in favor of the defendants.[6]

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[6] There is also no conflict between the decision of the court of appeals and the other lower federal court decisions cited but not discussed by petitioners (see Pet. 11 n.*). None of

2. Petitioners also claim (Pet. 14-20) that the district court committed reversible error in excluding evidence of respondents' joint lobbying efforts, but that argument also lacks merit. This Court has held that such activity does not violate the Sherman Act, 15 U.S.C. 1. *United Mine Workers* v. *Pennington*, *supra*; *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, *supra*. In *Pennington*, this Court added (381 U.S. at 670-671 n.3; emphasis added):

> It would of course still be within the province of the trial judge to admit this evidence, *if he deemed it probative and not unduly prejudicial*, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

In the present case, the district court excluded evidence of respondents' joint lobbying efforts because it deemed that evidence unduly prejudicial and of minimal probative value (Pet. App. B-25 n.22). Under Fed. R. Evid. 403, such a ruling may be disturbed on appeal only if the district court acted "arbitrarily or irrationally." *United States* v. *Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978). See also *United States* v. *Alessandrello*, 637 F.2d 133, 146 (3d Cir. 1980); *United States* v. *Ford*, 632 F.2d 1354, 1377 (9th Cir. 1980); *United States* v. *Masters*, 622 F.2d

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those cases held that proof of parallel business conduct is always sufficient to resist summary judgment when a price-fixing conspiracy is alleged, and all those cases involved evidence in addition to parallel pricing.

83, 88 (4th Cir. 1980). Whether the court of appeals was correct in holding that, on the facts of this case, the district court did not act arbitrarily or irrationally in refusing to consider this evidence does not present a question of general importance requiring review by this Court. There is no reason to believe that even if the evidence had been considered, petitioners would have successfully resisted respondents' motions for summary judgment. Petitioners still failed to produce any direct evidence of a conspiracy to fix interest rates in spite of eight years of discovery. Respondents' joint lobbying efforts easily can be explained for reasons unrelated to any desire to fix interest rates.[6] Consequently, absent other strong circumstantial evidence, admission of the lobbying evidence would not provide a sufficient basis for a jury verdict against the defendants.[7] In these circum-

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[6] To the extent that an 18% annual rate was the highest rate allowed by any state legislature at the time in question and a lower figure had been proposed in Illinois (Pet. App. A-10), it would have been in the interest of Illinois banks to lobby for the 18% maximum rate even if they planned to establish independent rates at a lower level. It would be in the interest of each bank operating independently to have the legal option to charge 18% rather than being restricted to a lower maximum rate.

[7] In our view, evidence of joint lobbying activities should be admitted, with a proper limiting instruction, when it is offered to corroborate other evidence of a prior agreement to fix prices. Under those circumstances, there is little danger that the jury would base its decision solely on the evidence of joint lobbying, and admission of such evidence would not chill the legitimate exercise of First Amendment rights. Since petitioners in this case sought to use the evidence in question to corroborate what they alleged was other evidence of an agreement to fix interest rates, we believe that the district court

stances, the district court's failure to consider this evidence did not prejudice petitioners.

Both petitioners and the dissenting judge on the court of appeals suggest (Pet. 15; Pet. App. A-44) that evidence may be excluded under Fed. R. Evid. 403 only if it "tends to horrify, evoke sympathy or increase a desire to punish due to prior bad acts." Their argument is conclusively refuted by the plain language of Rule 403, which provides (emphasis added):

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues, or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Obviously, evidence that does not tend to "horrify, evoke sympathy or increase a desire to punish due to prior bad acts" may nevertheless create a serious danger of "confusion of the issues * * * or misleading the jury."

Petitioners maintain (Pet. 16-17, 19) that the district court erred in applying Rule 403 in ruling upon a motion for summary judgment. In their view, the decision to admit or exclude under that rule "must be made in light of the precise trial context when it is offered" (Pet. 19). We disagree. Fed. R. Civ. P. 56(e) provides that affidavits supporting or

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could have considered the evidence. Nevertheless, since both the district court and the court of appeals concluded that petitioners' other evidence was not sufficient to prove an agreement to fix interest rates and since, as noted above, the evidence concerning joint lobbying adds little to petitioners' case, there is no reason for this Court to consider the issue in this case.

opposing summary judgment "shall set forth such facts as would be admissible in evidence." "[T]he policy of Rule 56(e) is to allow the affidavit to contain all evidentiary matter, which, if the affiant were in court and testifying on the witness stand, would be admissible as part of his testimony." 6 *Moore's Federal Practice* ¶ 56.22[1], at 1321-1322 (1980) (footnote omitted). "[T]he threshold issue of admissibility must be resolved before determining whether or not unresolved questions of fact exist." *United States* v. *Hangar One, Inc.*, 563 F.2d 1155, 1157 (5th Cir. 1977). Thus, if it is clear to the trial court even before trial that certain evidence should be excluded under Rule 403, the court should not consider that evidence in deciding a motion for summary judgment. Requiring the court to take that evidence into account at the summary judgment stage even though its exclusion at trial is foreordained would result in pointless trials in those cases in which the evidence in question is essential to one of the parties. It is true, of course, that the ruling contemplated by Rule 403 is sometimes influenced by unanticipated events at trial. Thus, in applying Rule 403 in a pretrial context, the trial court should take into consideration the possibility that events at trial might fortify the case for admitting the evidence. That possibility should also be considered by appellate courts in reviewing the district court's decision. In the present case, however, even when the possibility of unforeseen events at trial is taken into consideration, it is still clear that the district court's ruling was not arbitrary or irrational.

3. Petitioners next assert (Pet. 20-22) that the court of appeals applied an erroneous rule concerning the probative value of circumstantial evidence. The

rule in question was stated as follows in *Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 367 (8th Cir. 1949) (emphasis added):

> Where circumstantial evidence is relied upon to establish the conspiracy or any other essential facts, it is not only necessary that all the circumstances concur to show the existence of such conspiracy and facts sought to be proved, *but such circumstantial evidence must be inconsistent with any other rational conclusion.*

As petitioners correctly note (Pet. 20-21), in *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954), this Court disapproved as "confusing and incorrect" a jury instruction cast in similar terms. The Court stated (*id.* at 140) that "[c]ircumstantial evidence in this respect is intrinsically no different from testimonial evidence."

In the present case, the court of appeals quoted (Pet. App. A-15) the rule articulated in *Pevely Dairy Co.*, but apparently applied the following rule (Pet. App. A-15; emphasis added):

> [W]hen the plaintiff or prosecution relies on circumstantial evidence alone, the inference of unlawful agreement rather than individual business judgment must be the *compelling, if not exclusive, rational inference.*

However, assuming that the court below did not correctly describe the probative value of circumstantial evidence in a case such as this, we submit that its decision is nevertheless sound. Its opinion makes it clear that summary judgment was not awarded because petitioners failed to prove that an unlawful conspiracy was the exclusive rational inference that could be drawn from their circumstan-

tial evidence. Rather, the court repeatedly stated its conclusion that petitioners' evidence was simply inadequate to support a jury verdict in their favor (Pet. App. A-12, A-19, A-22).

4. Petitioners contend (Pet. 23-26) that the court of appeals failed to consider some of the evidence they adduced in opposition to respondents' summary judgment motions, but their argument is based upon a misreading of the court's opinion.

Petitioners state (Pet. 25):

> [I]t is clear that the majority considered plaintiffs' opposition evidence to consist solely of parallel interest rates, "together with evidence that the opportunity to conspire existed . . . ." 641 F.2d at 463 (App. A-12 [*sic*]).

What the court actually wrote was (Pet. App. A-14; emphasis added):

> *It is suggested* that while parallel pricing alone is not sufficient to establish a price-fixing conspiracy, such evidence together with an opportunity to conspire is sufficient to rebut defendants' denials and require a trial on the merits.

Thus, the court was merely rejecting an argument made on petitioners' behalf rather than listing all the evidence it had taken into consideration.

Petitioners contend (Pet. 25) that the court failed to consider evidence of respondents' "artificial product standardization and economic motive to conspire." However, the court's opinion discussed at some length petitioners' evidence of motive (Pet. App. A-20 to A-21) and referred to the affidavit of petitioners' economic expert (*id.* at A-9, A-10), which stated that respondents' product standardization exceeded that

required to make a compatible charge card system function (Pet. App. A-45 to A-46). Moreover, respondents' argument concerning product standardization was noted in the portion of the district court opinion to which the court of appeals referred in lieu of including a more detailed statement of facts in its own opinion (see Pet. App. A-5 to A-6, A-8).

5. Finally, petitioners maintain (Pet. 26-29) that the court of appeals violated the rule granting the party opposing summary judgment the benefit of all reasonable inferences arising from the evidence. To illustrate their point, petitioners cite (Pet. 27) a single example: the court's interpretation of a statement in a bank memorandum written at about the time discussions began concerning the formation of Midwest. The memorandum stated that "[Valley National Bank of Phoenix, Arizona] believe[s] that if anyone goes in Chicago, others will and this may result in chaos in the market" (Pet. App. B-9). Petitioners argue (Pet. 27) that the phrase "chaos in the market" can reasonably be interpreted to mean competition in interest rates and that the court of appeals erred in construing that phrase to mean "a retail market in which a vast number of charge cards existed" (Pet. App. A-21).

We find the court of appeals' reading much less strained than petitioners'. In addition, while the court of appeals' interpretation is supported by another internal bank memorandum written during the same period (see Pet. App. A-21 n.33), petitioners have pointed to no additional evidence supporting their construction. In any event, even if it is assumed that the statement in question gave rise to an inference in petitioners' favor, the strength of that inference would not be sufficient to alter the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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